STATE OF MICHIGAN

COURT OF APPEALS

PAUL ZIMMERMAN, JOHN FLORKOWSKI, DAVID MICHAEL RANDY HANVEY, BRYAN HILL, FREDERICK HARDER, JOHN DIVICO, CLYDE GROVES, GILBERT KOPACKI, and CONSTANT J. RUSIS, JR.,

Plaintiff-Appellants,

v

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, a/k/a AT&T,

Defendant-Appellee.

UNPUBLISHED
December 18, 1998

No. 199102
Wayne Circuit Court
LC No. 92-227672 NZ

Before: Jansen, P.J., and Kelly and Markey, JJ.

MARKEY, J. (dissenting).

I respectfully dissent.

Although I agree with the recitation of the facts set forth by the majority, I believe that they omitted some that are crucial and dispositive of this issue. As indicated, plaintiffs asserted a claim under § 301 of the Labor Management Relations Act (LMRA), 29 USC 301, to enforce the terms of the arbitration award. Plaintiffs and hundreds of other AT&T employees had filed grievances after they were laid off when AT&T downsized their entire work force. Although the grievances were arbitrated, sustained, and AT&T was required to "recall employees laid-off in violation of the Agreement and make them whole," the arbitration award did not address how this award was to be implemented and various other issues, including how the grievants would be made "whole." Consequently, because the arbitrator's award affected so many people, AT&T and the Communications Workers of America (CWA) negotiated and reached a separate, collectively-bargained agreement, interpreting and implementing the arbitration award. The agreement fashioned various remedies available to all eligible employees, including plaintiffs, one of which allowed for reinstatement of employment. Plaintiffs liked none of the choices proffered by this bargained-for agreement and, hence, filed this suit.

Plaintiffs are precluded from doing so because they have failed to exhaust their administrative remedies. There can be no disputing the fact that when the CWA negotiated the agreement as to the implementation of the arbitration award, it was acting as the union's, and including plaintiffs', exclusive agent. I agree with defendant that if plaintiffs have a dispute involving the interpretation or application of any provision of their collective bargaining agreement (CBA), the process for implementing the arbitration award or any other complaint involving their employment rights and arising out of their CBA, they must pursue the grievance procedures set forth in Article 9 of the CBA. Article 9 specifically provides:

> ARTICLE 9 - GRIEVANCE PROCEDURE
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> The Company and the Union recognize and confirm that the grievance procedures set forth in Article 9, and where applicable, Article 10 (Arbitration) and Article 11 (Mediation), provide the mutually agreed upon and exclusive forums for resolution and settlement of employee disputes during the term or this Agreement. A grievance is a complaint involving the interpretation or application of any of the provisions of this Agreement, or a complaint that an employee(s) has in any manner been unfairly treated. Neither the Company, nor the Union, its locals or representatives will attempt by means other than the grievance, arbitration, and/or mediation procedures to bring about the resolution of any issue which is properly a subject for disposition through such procedures. It shall be the objective of both the Company and the Union to settle the grievance promptly and at the lowest step of the grievance procedure. [Emphasis added.]

Plaintiffs cannot proverbially "have their cake and eat it too." As members of a union, they have agreed to have their union represent them in all matters involving collective bargaining. That is precisely what occurred here. Presumably, had plaintiffs *liked* one of the bargained-for arbitration award packages, they would have made their choice and accepted the benefits and privileges conferred by union membership. Article 9 expressly requires that if an employee has any complaint of unfair treatment or any matter involving the interpretation or application of the CBA, he must utilize the procedure for grievances. See, e.g., *United Mine Workers v Consolidation Coal Co*, 666 F2d 806 (CA3, 1981). I do not believe that there can exist any genuine issue as to this material fact, and I would uphold the trial court's grant of summary disposition on this issue.

Plaintiff's second issue involves a hybrid claim for retaliation under the Elliott-Larsen Civil Rights Act, MCL 37.2701; MSA 3.548(701) arising out of plaintiffs' previous age discrimination complaint filed against defendant. As stated above, CWA's grievance procedure is extremely broad and appears to cover any complaint that a CWA member may have regarding actions of its union alleged to be in violation of "the Union Constitution, Local Bylaws, rights and privileges of members." Plaintiffs offer no real excuse for their failure to exhaust their own internal union remedies as set forth under the internal appeal procedures.

Moreover, in *Clayton v International Union, United Automobile Aerospace and Agricultural Implement Workers of America*, 451 US 679, 692-696; 101 S Ct 2088; 68 LEd 2d

538 (1981) the U.S. Supreme Court has outlined the factors a trial court must consider in determining whether to require a litigant to exhaust his internal union procedures before instituting a hybrid claim under § 301:

1. Whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim;

2. Whether the internal union appeals procedures would be inadequate to either reactivate the employee's grievance or to award the full relief he seeks under § 301;

3. Whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. *Clayton v International Union, UAW* 451 US 679, 692-696 (1981).

Also, requiring an employee to exhaust his internal union procedures before bringing a hybrid § 301 claim is strongly favored. *Ryan v General Motors Corp*, 929 F2d 1105, 1110 (6th Cir 1989). Again none of the facts in the record below are sufficient to constitute a genuine issue of a material fact so as to avoid summary disposition.

Finally, plaintiffs also claim that the trial court erred in dismissing their claim of retaliation under the Civil Rights Act because there existed no genuine issue of a material fact. As indicated previously, the majority omits facts crucial to the resolution of this issue and simply asserts in a cursory manner that because two other employees were "permitted to change their elections under the award package" and plaintiffs were not that such is sufficient to create a genuine issue of this material fact. The majority's opinion ignores the fact that the packages offered these few plaintiffs under the collectively-bargained for resolution of the arbitration award were also offered to hundreds of other employees affected by the downsizing, and they did choose one. Moreover, the fact that one or two employees were allowed to change their elections under the award package - as one would certainly expect when dealing with hundreds of employees - is totally inadequate to magnify the issue into one that is genuinely material as required. Consequently, I would affirm the trial court's grant of summary disposition on all counts.

/s/ Jane E. Markey